

Queensland Real Estate Industry Information

From Barry Gannon, Secretary, Property Sales Association of Queensland

Real Estate Industry Award – Enforcement

Introduction

The PSAQ, in its present form, has been operating since 1995. In that period, it has consistently adopted the approach of encouraging employers to meet their award obligations, rather than applying direct enforcement.

Since the introduction of 'WorkChoices' by the previous Federal Government in 2005, workplace relations progressively transferred from State jurisdictions to Federal, and in this industry, the PSAQ has consistently led negotiations nationally. Of particular interest to 'real estate' employers, the PSAQ's submissions regarding the (federal) Real Estate Industry Award 2010 (award) enabled the continuation of commission offset (debit-credit) and commission-only arrangements – without the PSAQ's official support such options would, by now, no longer exist.

Current circumstances

The federal award has now been operating for just over two years. Under the award, commission arrangements outlined above are permissible only if a written agreement is registered with the Queensland Property Industry Registry (QPIR).

Ever since the original the State award was introduced in 1997, the PSAQ has observed 'real estate' business owners seeking many and creative ways to try and avoid their legal obligations. The most recent of these is the use of 'independent contractor' and 'conjunctional agent' arrangements. As highlighted in a recent court decision circulated by the Real Estate Employers' Association, such arrangements are not always as they appear. In the PSAQ's view, the majority would fall within the 'Sham arrangements' provisions of the *Fair Work Act 2009* (Act).

There are also still significant numbers of 'real estate' employers who have not registered written agreements, and so fall within the 'Contravening a modern award' provisions of the Act.

Persistent complaints

Due to persistent complaints received by the PSAQ from both underpaid employees, and from real estate business owners concerned that competitors' non-compliance is providing an unfair commercial advantage, the PSAQ has adopted a new enforcement policy. In a break with past practice, the following will now apply:

1. The PSAQ will **actively seek** persons who have not received entitlements to which they were due. This especially includes those who were engaged as 'independent contractors' or 'conjunctional agents' and who would not have qualified for commission-only arrangements under the award.
2. In addition to the recovery of entitlements, the PSAQ will seek that **monetary penalties be applied** to business owners. [For failing to register a written agreement **or** misrepresenting employment as independent contracting arrangement (i.e. a sham), the penalty is up to \$33,000.00 **per breach**. In the case of sham contracting, a penalty will be sought for **both** breaches.]

To give businesses an opportunity to comply with their obligations, item 1 above will take effect from 1 April 2012. Item 2 above is effective immediately.

What to do?

Real estate business owners are encouraged to do the following **by no later than 1 April 2012**:

- If they have engaged 'independent contractors' or 'conjunctional agents', review those arrangements with a suitably-qualified professional.
- Ensure that agreements for 'real estate' employees are registered as required by the award.

Please Note:

Many tests are applied in law as to whether or not a bona-fide independent contractor relationship exists, and any two lawyers will have three different views. However as a starting point, here are some questions to ask:

- *Is the 'contractor' permitted to work for your opposition at the same time as yourself?*
- *Is the 'contractor' allowed to take their databases, contact lists and appointments to act (listings and property managements) with them on leaving?*
- *Is the 'contractor' creating a business with goodwill that is saleable by the contractor?*

*If the answer to any one of the above is 'no' the relationship is most likely **not** that of an independent contractor.*

Finally, given that most 'conjunctional agent' arrangements are simply a different way of describing 'independent contracting', these also need to be carefully scrutinised.

Questions?

Those with questions may wish to make use of the following:

- The contractor decision tool on the Federal government's business site – www.business.gov.au/IndependentContractors/DecisionTool.aspx
- Business owners may contact the Real Estate Employers' Association (www.reea.org.au). **Note: Non-REEA members should first submit a Membership Application**
- Employees may contact the PSAQ (www.psaq.com.au), again only after submitting a membership application
- Queries about agreement registration generally may be directed to QPIR (P: 07 3219 7622)
- Information about and forms to comply with agreement registration are available from www.qpir.com.au
- Written agreements are available from:
 - www.realworks.com.au
 - www.repsa.com.au.